

Jon Bohnenkemper, d/b/a South State Builders, and its alter ego/successor South State Builders, Inc. and Sheet Metal Workers International Association, Local Union No. 20 a/w Sheet Metal Workers International Association, AFL-CIO. Case 25-CA-27989-1

June 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On October 2, 2002, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified.¹

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 1.

"1. Respondent engaged in unfair labor practices within the meaning of Section 7, Section 8(a)(1), and Section 2(6) and (7) of the Act by Jon Bohnenkemper.

"(a) Impliedly threatening employees with discharge by telling employees they would not have been hired if their union affiliation were known at the time of hiring.

"(b) Impliedly threatening employees with discharge by telling them that it contemplated discharging them upon learning of their union affiliation.

"(c) Threatening employees with discharge by telling employees that it can discharge them in retaliation for their union activities without legal ramifications.

"(d) Threatening to file suit against union representatives in response to its employees' protected union activities."

¹ No exceptions were filed to the judge's findings that Respondent violated Sec. 8(a)(3) and (1) by laying off Vernon Stonestreet and Jeffrey Bullington on October 9, 2001, and that Respondent violated Sec. 8(a)(1) by making remarks that interfered with, restrained, and coerced Stonestreet and Bullington in the exercise of their rights guaranteed in Sec. 7 of the Act. The General Counsel excepted to the judge's failure to list each of the 8(a)(1) violations in the conclusions of law, and to include a remedy for those violations in the Order and notice. The General Counsel also excepted to the judge's failure to order the Respondent to post the notice, in addition to mailing it to employees. The Respondent did not oppose these exceptions. We modify the conclusions of law, Order, and notice to correct these omissions.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Jon Bohnenkemper, d/b/a South State Builders and its alter ego/successor South State Builders, Inc., Jasper, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraphs 1(a) through (d), and renumber the subsequent paragraphs accordingly.

"(a) Impliedly threatening employees with discharge by telling employees they would not have been hired if their union affiliation were known at the time of hiring.

"(b) Impliedly threatening employees with discharge by telling them that it contemplated discharging them upon learning of their union affiliation.

"(c) Threatening employees with discharge by telling employees that it can discharge them in retaliation for their union activities without legal ramifications.

"(d) Threatening to file suit against union representatives in response to its employees' protected union activities."

2. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its jobsites copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. Since work has been completed at the Davies School project in Oden, Indiana, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Oden jobsite at any time since the commencement of the unfair labor practices on October 9, 2001, and to all the discriminatees named herein."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT impliedly threaten our employees with discharge by telling employees they would not have been hired if their union affiliation were known at the time of hiring.

WE WILL NOT impliedly threaten our employees with discharge by telling them that we contemplated discharging them upon learning of their union affiliation.

WE WILL NOT threaten our employees with discharge by telling them that we can discharge them in retaliation for their union activities without legal ramifications.

WE WILL NOT threaten to file suit against union representatives in response to our employees' protected union activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Sheet Metal Workers International Association Local Union No. 20, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Vernon Stonestreet and Jeffery Bullington full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Vernon Stonestreet and Jeffery Bullington whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

JON BOHNENKEMPER, D/B/A SOUTH STATE BUILDERS, AND ITS ALTER EGO/SUCCESSOR SOUTH STATE BUILDERS, INC.

Kimberly R. Sorg-Graves, Esq., for the General Counsel.

Jon Bohnenkemper, pro se, for the Respondent.

Neil E. Gath, Esq. (Fillenwarth, Dennerline, Groth & Towe), of Indianapolis, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Jasper, Indiana, on August 12 and 13, 2002. The

charge was filed January 3, 2002, and the complaint was issued April 17, 2002.

The General Counsel alleges that Respondent interfered with, restrained, and coerced employees Vernon Stonestreet and Jeffery Bullington on October 9, 2001 in violation of Section 8(a)(1) and then discharged them the same day in violation of Section 8(a)(3) and (1).

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Throughout 2001, Jon Bohnenkemper operated Respondent, South State Builders, as a sole proprietorship. His office was and is in Jasper, Indiana. South State was and is a roofing contractor and during 2001 performed services valued in excess of \$50,000 outside the State of Indiana. Despite its assertions to the contrary, South State Builders employed employees and thus I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that the Union, Sheet Metal Workers International Association, Local Union No. 20, is a labor organization within the meaning of Section 2(5) of the Act. In January 2002, South State Builders Incorporated. However, it continues to operate exactly as it did before incorporation, performing the same kind of services for the same customers. Employees working for South State Builders, Inc. continue to be supervised in their work exclusively by Jon Bohnenkemper and at least some of them worked for South State Builders before it incorporated.

II. ALLEGED UNFAIR LABOR PRACTICES

In September 2001, SPS Corporation, a supplier and installer of metal siding and roofing issued Respondent a purchase order to install metal roof panels on the North Davies Elementary School in Oden, Indiana.² Prior to Respondent's arrival on the jobsite, Williams Construction Company, another contractor, had already installed 20,000 square feet of the 80,000 square feet of roofing panels. The two discriminate in this case, Vernon Stonestreet and Jeffery Bullington, worked for Williams on the Davies School project. The Union sent them to Williams as "salts" but they never revealed their union affiliation prior to Williams' departure from the job.

To complete the purchase order, South State transferred six employees from a jobsite in Carrollton, Kentucky, to the Davies School project. On September 19, Jerry Ramsey, business representative for the Union, went to this jobsite. Ramsey met with South State's owner, Jon Bohnenkemper, and told him that he was not paying his employees the wage rate required by Indiana's "prevailing wage rate" statute. Bohnenkemper was paying his employees the rate specified for roofers; Ramsey contended that he was required to pay the rate specified for

¹ The word "concedes" is repeatedly mistranscribed as "conceives."

² Oden is about 40–50 miles west of Jasper and northeast of Evansville, Indiana.

sheet metal workers, which is about \$10 per hour higher (in excess of \$31).

Ramsey also instructed Stonestreet and Bullington to go back to the Davies School and apply for work with South State. They did so, without revealing their union affiliation, on September 20. Bohnenkemper hired Stonestreet and Bullington and told them to start work on Monday, September 24. Bohnenkemper informed the two salts that they would be paid by Manpower, Inc. and that they would have to fill out a Manpower employment application which he would fax to Manpower's office in Madison, Indiana.

Stonestreet and Bullington started work on September 24 and were given the employment applications on the afternoon of September 25. They returned them to Bohnenkemper on the morning of September 26. Neither employee was interviewed nor had any contact with Manpower. No representative of Manpower ever came to the Davies jobsite. Jon Bohnenkemper performed all the supervision of employees who were laying roofing panels.

Shortly after they started working for South State, Stonestreet and Bullington were contacted by a State of Indiana inspector regarding their wages. Business Representative Jerry Ramsey had contacted this inspector. Shortly thereafter, Respondent began paying its employees the higher wage rate specified for sheet metal workers.

On Tuesday, October 2, four union organizers came to the Davies School jobsite. Bohnenkemper told his employees that they could talk to the organizers but that he wouldn't join Jerry Ramsey's union. He also said that when he met Ramsey the week before, he would have liked to have thrown him off the roof.

Ramsey returned to the Davies School jobsite on Tuesday, October 9, 2001. He brought with him a letter identifying Stonestreet and Bullington as union organizers. Ramsey also told Bohnenkemper orally that the two employees were organizers. Shortly thereafter both Stonestreet and Bullington revealed union T-shirts that they had been wearing underneath other articles of clothing.

Shortly before lunch, Bohnenkemper approached Stonestreet and Bullington and said they had lied to him, because he had asked them whether they were affiliated with the Union. Stonestreet responded that Bohnenkemper was not supposed to make such inquiries. Bohnenkemper said that if he had known that Stonestreet and Bullington were being paid by the Union, he would have hired somebody else. Bohnenkemper also remarked that he would file suit against Jerry Ramsey if he continued to harass him.

During lunch, Bohnenkemper approached Stonestreet and Bullington again and told them that he was tempted to tell Jerry Ramsey to take the two of them with him when Ramsey left the jobsite that morning. He also told them that he could find a way to get rid of them if he so desired.

At the end of the day, Bohnenkemper approached Stonestreet and Bullington a third time. He told them that Respondent was running short of roofing panels and stitch screws and therefore he was going to lay the two off, since they were the newest employees. This assertion was inaccurate in that Bohnenkemper had hired two employees for the Davies School job

after the two salts started work. These employees were Amber Hastings, who started work on October 1, and William Upton who started work on October 8.

Analysis

Respondent violated Section 8(a)(3) and (1) in laying off Vernon Stonestreet and Jeffrey Bullington on October 9, 2001.

In order to prove a violation of Section 8(a)(3) and (1), the General Counsel must show that union activity or other protected activity has been a substantial factor in the employer's adverse personnel decision. To establish discriminatory motivation, the General Counsel must show union or protected concerted activity, employer knowledge of that activity, animus or hostility towards that activity and an adverse personnel action caused by such animus or hostility. Inferences of knowledge, animus and discriminatory motivation may be drawn from circumstantial evidence as well from direct evidence.³ Once the General Counsel has made an initial showing of discrimination, the burden of persuasion shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981).

As a preliminary matter, I conclude that South State Builders was Stonestreet and Bullington's employer. Bohnenkemper does not contend that the employees on the Davies School job were independent contractors. He suggests that Manpower, Inc., was their employer. Manpower provided payroll and administrative services to South State for its employees. Jon Bohnenkemper was the only person who directed the employees at Davies in the manner and means by which they were to perform their tasks. For example, he directed Stonestreet to wear his tool belt at all times. Bohnenkemper also hired employees, set the terms and conditions of their employment and fired them—without input from Manpower or anyone else. No representative of Manpower ever visited the Davies School jobsite.

The General Counsel has made a prima facie case of discrimination. Stonestreet and Bullington were on the Davies project as union organizers. Bohnenkemper discharged them within hours of discovering this fact, after making a number of comments establishing his animus towards the Union. Moreover, I also infer discriminatory motive from the pretextual nature of Bohnenkemper's explanation for the discharges. It is well settled that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal, *Fluor Daniel, Inc.*, 304 NLRB 970, 971 (1991); *Fast Food Merchandisers*, 291 NLRB 897, 898 (1988); *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966); and *Reeves v. Sanderson Plumbing Products*, 530 U.S.133 (2000).

Bohnenkemper testified that he laid Stonestreet and Bullington off because he was running out of work for his employees

³ *Flowers Baking Co.*, 240 NLRB 870, 871 (1979); *Washington Nursing Home, Inc.*, 321 NLRB 366, 375 (1966); *W. F. Bolin Co. v. NLRB*, 70 F.3d 863 (6th Cir. 1995).

at the Davies School. Since six–eight employees continued working at the project after October 9, Respondent would have to prove that the alleged discriminates were selected for layoff for non-discriminatory reasons to establish an affirmative defense. South State falls far short of meeting this burden.

An obvious problem with Respondent's defense is that it hired two employees after Stonestreet and Bullington, one of whom started the day before the lay off. Even assuming that there is a credible nondiscriminatory explanation for a lay off; there is no such explanation for laying off the discriminates rather than the two newer employees.

Bohnenkemper testified that he asked Stonestreet and Bullington if they would be willing to travel to other worksites, particularly the project he had in Carrollton, Kentucky. He testified further that because the discriminates indicated that they would not do so, he laid them off rather than the new employees. I credit the testimony of the discriminates that Bohnenkemper never asked them about the Carrollton job or any other except for a potential job in Jasper. I credit their testimony that they never indicated that they would be unwilling to work at sites other than the Davies School.

I also decline to credit Bohnenkemper's testimony that the two new employees, Amber Hastings and William Upton indicated a willingness to work in Carrollton and other sites. First of all, there is nothing to corroborate this self-serving testimony and the only evidence in the record (GC Exh. 4) indicates that Hastings and Upton worked exclusively at the Davies School project until December 2001, when their employment with South State ended.

There is also no indication that Respondent needed to transfer any employees to Carrollton on October 9. It was not until October 21, that any employee was sent to Carrollton from the Davies School. That employee, Fred Johnson, was almost immediately replaced at Davies by a new hire, Pat Bryant.

Bohnenkemper testified at length about the fact that he was given two separate purchase orders for the Davies School. The first was to install the roof panels and the second was to perform gutter work. I credit his testimony that SPS did not issue him the second purchase order until late November. This is indicated by the fact that Respondent hired a number of new employees at this time. However, the receipt of the second purchase order is irrelevant to the issues in this case. It is evident that Respondent had a substantial amount of work on the project after October 9, and that six to eight of employees continued to work at the school. Even assuming that South State needed fewer employees on October 9, than previously, there is no credible nondiscriminatory explanation for Respondent selecting Stonestreet and Bullington for layoff on that date—particularly given the close proximity to the jobsite visit by Ramsey and Bohnenkemper's discovery that the discriminates were union organizers.

Respondent Violated Section 8(a)(1) as Alleged in Complaint Paragraph 5

After meeting with Ramsey on October 9, Bohnenkemper told Stonestreet and Bullington that he would not have hired them if he knew they were paid union organizers, that he had been tempted to discharge them when Ramsey was at the site,

that he could get rid of them if he wanted to and that he might file suit against Jerry Ramsey. These remarks interfered with, restrained, and coerced the discriminates in the exercise of their rights guaranteed in Section 7 of the Act and thus violated Section 8(a)(1). Indeed, it is evident that Bohnenkemper made these remarks while he was contemplating how he could discharge Stonestreet and Bullington and that the remarks were likely to give the two employees the impression that he was looking for a way to get rid of them.

Jon Bohnenkemper, Doing Business As South State Builders, and South State Builders, Inc.,
are Jointly and Severally Liable to Remedying
the Unfair Labor Practices Found Herein.

South State Builders, Inc., has identical management, business purpose, operations, equipment, customers, supervision, and ownership, as did South State Builders in 2001. Thus, despite any evidence as to Respondent's motive in incorporating, I find that South State Builders, Inc. is an alter ego of South State Builders. It is the same company and is thus responsible for remedying the unfair labor practices of South State Builders.

South State Builders, Inc. is also responsible for remedying South State Builders unfair labor practices because it is a successor to South State Builders. Since the two companies are essentially the same, South State Builders, Inc. obviously had knowledge of South State Builders' unfair labor practices when it started operating as a corporation. The two entities therefore are jointly and severally liable for remedying these violations, *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973).

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) on October 9, 2001, by making remarks to Vernon Stonestreet and Jeffrey Bullington that had a tendency to interfere with, restrain, and coerce them in the exercise of their Section 7 rights.

2. Respondent violated Section 8(a)(3) and (1) in discharging Vernon Stonestreet and Jeffrey Bullington on the same date.

3. South State Builders, Inc. and South State Builders are alter egos.

4. South State Builders, Inc. is a successor to South State Builders.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Vernon Stonestreet and Jeffrey Bullington, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, Jon Bohnenkemper, d/b/a as South State Builders and its alter ego/successor South State Builders, Inc., Jasper, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting Sheet Metal Workers International Union Local Union No. 20 or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Vernon Stonestreet and Jeffrey Bullington full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Vernon Stonestreet and Jeffrey Bullington whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3

days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix"⁵ to all employees who were employed by the Respondent at the Davies School project in Oden, Indiana, at any time from the onset of the unfair labor practices found in this case, October 9, 2001, until the completion of these employees' work at that jobsite. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."